

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

AUG. 12,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Professional Product Research, Inc.

Serial No. 75/246,916

William H. Cox of Janvey, Gordon, Herlands, Randolph,
Rosenberg & Cox, LLP for Professional Product Research,
Inc.

Barney L. Charlon, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Cissel, Hohein and Bottorff, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On February 24, 1997, applicant applied to register
the mark "SPIDER FIGHTER" on the Principal Register for
"insecticide," in International Class 6. The application
was based on applicant's assertion that it possessed a bona
fide intention to use the mark in commerce on or in
connection with the goods.

The Examining Attorney refused registration under Section 2(d) of the Act, holding that if applicant were to use the proposed mark on insecticide, the mark would be likely to cause confusion with two registered trademarks. The first mark cited as a bar to registration is "FLY FIGHTER," which is registered¹ for "insecticide." The second mark is "PEST FIGHTER," which is registered² for "pesticides for horticultural purposes."

The Examining Attorney also advised applicant that the identification-of-goods clause in the application was indefinite, and required that it be amended to be more specific. Further, the Examining Attorney required applicant to disclaim the descriptive the word "SPIDER" apart from the mark as shown.

Responsive to the first Office Action, applicant amended the identification-of-goods clause to read "insecticides for domestic use," and provided the requested disclaimer. Further, applicant argued against the refusal

¹ Registration No. 823,224, issued January 31, 1967 to Alco Chemical Co. based on a claim of use since December 12, 1957. The word "fly" is disclaimed apart from the mark as shown. The registration was subsequently assigned to Amvac Chemical Corp. and was renewed in 1987.

² Registration No. 1,971,482, issued to Master Nurserymen's Association on April 30, 1996, based on a claim of use in commerce since January 30, 1995. The word "pest" is disclaimed apart from the mark as shown.

to register, contending that confusion with either of the two cited registered trademarks would not be likely.

With his second Office Action, the Examining Attorney accepted the amendment to the identification-of-goods clause, accepted the disclaimer, and withdrew the refusal based on the registration for "PEST FIGHTER." He did, however, maintain and make final the refusal to register under Section 2(d) based on the prior registration of "FLY FIGHTER" for "insecticide."

Applicant timely filed a Notice of Appeal and an appeal brief. The Examining Attorney filed in his responsive brief on appeal, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based on the written record and arguments.

The sole issue in this appeal is therefore whether confusion would be likely if applicant's proposed mark "SPIDER FIGHTER" were to be used on insecticides for domestic use in view of the cited registration of "FLY FIGHTER" for insecticides. In its brief, applicant also presented arguments directed to the other registered mark originally cited by the Examining Attorney as a bar to registration. Apparently, applicant had not noticed that

the Examining Attorney's second Office Action had withdrawn that registration as a basis for refusal.

Based on careful consideration of the record in this application and the arguments presented on both sides of the issue, we conclude that confusion is likely.

The test for determining whether confusion is likely is well settled. We must consider the similarity of the marks, in terms of their appearances, their pronunciations, their connotations and their overall commercial impressions. We must also compare the goods set forth in the cited registration with the goods as identified in the application in order to determine if they are related in such a way that the use of the marks in question is likely to lead to confusion or mistake in the marketplace for such products. In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

In that the goods specified in this application are encompassed within the goods as they are identified in the cited registration, the critical question in this case is whether, as applied to the same products, these two marks are so similar that they are likely to cause confusion.

Applicant argues that the marks are sufficiently dissimilar in terms of pronunciation, appearance, meaning and connotation that they will not give rise to any

likelihood of confusion under Section 2(d). In particular, applicant argues that the word common to both marks at issue, "FIGHTER," is a suggestive term in connection with the goods in question, and that when this suggestive term is combined with the word "FLY" on the one hand, and the word "SPIDER" on the other, the resulting marks in their entireties are different in appearance, sound, and connotation, and create different commercial impressions.

Further, applicant contends that the existence of the two registered marks originally cited by the Examining Attorney, as well as in another one for the mark "BUG FIGHTER,"³ for "electrically-powered insect exterminator traps," and one for the mark "FLEA FIGHTER,"⁴ for "proteins, vitamin and mineral supplement for dogs," substantiate applicant's argument that the word "FIGHTER," while the dominant component of the two marks involved in this appeal, is weak in source-identifying significance, and that there is therefore no likelihood of confusion between applicant's mark and cited registered mark. In further support of this contention, applicant notes that until 1995, another third-party registration existed for the same

³ Registration No. 1,367,415 issued on Oct. 29, 1985, to Armatron International, Inc.

⁴ Registration No. 1,127,173, issued on Dec. 4, 1979 to Vital Nutrition Products, Inc.

mark applicant is attempting to register now, except that the goods therein were identified as "natural insect repellent."⁵

Applicant's argument is essentially that while the word "FIGHTER" is the dominant part of applicant's mark, the word is highly suggestive of the purpose, effect and nature of both applicant's goods and of the goods in each of the various registrations. As a result of this, applicant contends that its mark is visually and aurally distinguishable from the registered mark cited against it, that it has a different connotation, and that it therefore creates a different commercial impression, so that confusion is not likely.

We agree with the Examining Attorney, however, that if these two marks were used on the goods specified in the application and the registration, respectively, they would create similar commercial impressions. While we do not dispute that the word "FIGHTER" is suggestive as applied to these products, the fact is that the suggestion created by the word is the same in each mark. The registered mark suggests that the insecticides sold thereunder will fight flies. The mark applicant seeks to register, if also used

⁵ Reg. No. 1,559,524, issued to Indiana Botanic Gardens, Inc. on Oct. 10, 1989.

on insecticides, would suggest that the products fight spiders. Although there is obviously a difference between flies and spiders, it would not be unreasonable for consumers of insecticides for household use to assume, incorrectly in this case, that "SPIDER FIGHTER" insecticide and "FLY FIGHTER" insecticide emanate from the same manufacturer or supplier.

We are not persuaded to the contrary by applicant's argument concerning the third-party registrations. It is well established that third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). Third-party registrations are not evidence of what happens in the marketplace, or that the public is familiar with the use of such marks. National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975). Moreover, distinctions can be made among the various products which the third-party registrations list. Protein vitamin and mineral supplements for dogs, electronically-powered insect exterminators, and natural insect repellents are quite different from insecticides. This record certainly does not establish that consumers would have a basis for assuming that all these products are produced or sold by

the same businesses, but the record does show that the goods set forth in the application are identical to those specified in the cited registration.

Third-party registrations may be used to establish the meanings of terms, but the suggestive meaning of "FIGHTER" in the instant case is not disputed. The third-party registrations of record, therefore, are not persuasive evidence that confusion is unlikely. As noted above, there are differences between the goods listed in those registrations, and, in any event, each case must be decided on its own merits.

In summary, applicant's mark "SPIDER FIGHTER" and the registered mark "FLY FIGHTER" are similar. They create similar commercial impressions because they each include the same dominant word, which in both cases is preceded by the name of a specific insect. As applicant concedes, the goods specified in the registration encompass the goods set forth in the application.

Furthermore, any doubt as to whether confusion is likely must be resolved in favor of the prior registrant and against the applicant, who has a legal duty to select a mark which is dissimilar to trademarks which are already in

Ser No. 75/246,916

use. *Burroughs Wellcome Co. v. Warner-Lambert Company*, 203
USPQ 191 (TTAB 1979).

Accordingly, the refusal to register is affirmed.

R. F. Cissel

G. D. Hohein

C. M. Bottorff
Administrative Trademark Judges,
Trademark Trial & Appeal Board

Ser No. 75/246,916